89-782

Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

FREDERICK SMITH, in his individual and official capacity as Principal Bradford Area High School; **RICHARD MILLER**, in his individual and official capacity as assistant principal of the Bradford High School; and **FREDERICK SHUEY**, in his individual and official capacity as Superintendent of the Bradford Area School District

Petitioners

vs

JUDY GROVE SOWERS

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED

A. Are school students "at liberty" during summer vacation so that, under the rationale of this Court in *DeShaney v. Winnebago County* there exists no duty under the Fourteenth Amendment for school administrators to protect them from criminal assaults?

B. Was there clearly established law in 1979 that school administrators had a duty under the Fourteenth Amendment to protect school students from criminal assaults?

C. Can this Court's holding in *City of Canton v. Harris* that municipal bodies may be held accountable for a policy amounting to "deliberate indifference" to the rights of citizens be extended to create a new theory of personal liability for municipal officials?

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IV. OPINIONS BELOW

A. Procedural History of This Case

The Judgment Order of the United States Court of Appeals for the Third Circuit on remand (the Order sought to be reviewed) is printed in the Appendix hereto, page 1.

The procedural history of this appeal is as follows: Judy Grove Sowers [hereinafter "Sowers"], sought damages under § 1983 after she claimed that a Bradford Area High School teacher sexually attacked her while she was visiting him in his home during summer vacation. On August 29, 1988, the United States District Court for the Western District of Pennsylvania, at Civil Action No. 88-57 Erie in that Court, denied a Motion to Dismiss submitted by all Defendants; its Opinion is reported at 694 F.Supp. 125 (W.D.Pa. 1988), and is printed in the Appendix hereto at p. 39. Defendants Frederick Smith, Richard Miller and Frederick Shuey [hereinafter "Smith, Miller and Shuey"] appealed that Order to the United States Court of Appeals for the Third Circuit insofar as the District Court had denied their Motion to Dismiss on the basis of qualified immunity. The Court of Appeals affirmed the District Court by Judgment Order dated January 31, 1989, at No. 88-3640 in that Court. That Order is printed in the Appendix hereto at p. 81.

Smith, Miller and Shuey then filed a timely Petition for Writ of Certiorari with this Honorable Court. This

Court granted the petition on April 3, 1989, summarily vacated the Order of the Court of Appeals, and remanded the case for reconsideration in light of this Court's ruling in the case of *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. , 109 S.Ct. 998 (1989). That Order is printed in the Appendix hereto at p. 87 and is reported at 109 S.Ct. 1634.

On remand, the Court of Appeals again affirmed the District Court by Judgment Order dated September 28, 1989. As noted, that Order is printed in the Appendix beginning at page 1. It is this Order which is the subject of the current petition.

B. Related Proceeding

This case is related to the case of *Stoneking v. Bradford Area School District, et al.*, 856 F.2d 594 (3d Cir. 1988), *cert. granted, vacated and remanded sur nom. Smith v. Stoneking* 109 S.Ct. 1333 (1989); *reaffirmed on remand* 882 F.2d 720 (1989). A second petition for writ of certiorari in that case is being filed simultaneously with this petition.

In *Stoneking*, another Bradford Area High School student claimed that she was sexually abused by the same teacher Sowers has accused of abusing her. Stoneking filed suit seeking damages under § 1983, on a legal theory very similar to that advanced by Sowers.

On August 28, 1987, the United States District Court for the Western District of Pennsylvania, at Civil

Action No. 87-63 E in that Court, denied a Motion for Summary Judgment submitted by all Defendants; its Opinion is reported at 667 F.Supp. 1088 (W.D.Pa. 1988), and is printed in the Appendix hereto at p. 91. Smith, Miller and Shuey appealed that Order to the United States Court of Appeals for the Third Circuit insofar as the District Court had denied their Motion for Summary Judgment on the basis of qualified immunity. The Court of Appeals affirmed the District Court by Opinion and Order dated September 12, 1988, at No. 87-3637 in that Court. That Opinion is reported at 856 F.2d 594 (3d Cir. 1988), and is printed in the Appendix hereto at p. 135.

Smith, Miller and Shuey then filed a timely Petition for Writ of Certiorari with this Honorable Court. This Court granted the petition on March 6, 1989, summarily vacated the Order of the Court of Appeals, and remanded the case for reconsideration in light of this Court's ruling in the case of *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. , 109 S.Ct. 998 (1989). That Order is printed in the Appendix hereto at p. 165 and is reported at 109 S.Ct. 1333.

On remand, the Court of Appeals again affirmed the District Court by Opinion and Order dated August 16, 1989. Appendix, p. 169 [hereinafter "*Stoneking II*"]. A Petition for a Writ of Certiorari has been prepared in that case and is intended to be filed simultaneously with this Petition.

V. STATEMENT OF JURISDICTION

Jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254.

The Judgment Order of the United States Court of Appeals for the Third Circuit was entered on September 28, 1989. App., page 1.

Jurisdiction for the appeal to the United States Court of Appeals for the Third Circuit was based upon 28 U.S.C. § 1291. The appeal to the United States Court of Appeals for the Third Circuit was made in accord with *Mitchell v. Forsyth*, 472 U.S. 511 (1985), which holds that a denial of a claim of qualified immunity is an appealable final order within the meaning of 28 U.S.C. § 1291.

Jurisdiction of the United States District Court for the Western District of Pennsylvania was invoked by Plaintiff based upon 28 U.S.C. § 1983.

VI. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following are the constitutional provisions and statutes involved in this appeal:

A. Constitutional Provisions

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States under the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Amendment 14, Section 1.

B. Federal Statutes

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof

to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit and equity, or other proper proceeding for regress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983

C. State Statutes

Every teacher, vice principal and principal in the public schools shall have the right to exercise the same authority as to conduct and behavior over the pupils attending his school, during the time they are in attendance, including the time required in going to and from their homes, as the parents, guardians or persons in parental relation to such pupils may exercise over them.

24 Pa.C.S.A. § 13-1317.

VII. STATEMENT OF CASE

The facts material to the consideration of the questions presented are as follows. The Bradford Area School District (the "School District"), which is not a party to this appeal, is a local governmental agency organized pursuant to the laws of the Commonwealth of Pennsylvania. During the relevant period of time, Petitioner Smith was the principal of the Bradford Area High School; Petitioner Miller was the assistant principal; and Petitioner Shuey was the superintendent of the School District.

Respondent Judy Grove Sowers ("Sowers") attended the Bradford Area High School, graduating in 1980.

The record before the District Court and the Court and the Court below reveals the following:

Sowers contends in her Complaint that in June of 1979 the former band director of the Bradford Area High School, Edward Wright, sexually assaulted her. Complaint, par. 12, App. p. 11. Although she omits these material facts from her Complaint, she has testified in a deposition taken in a related case that, during her summer school vacation and after becoming intoxicated at her sister's wedding reception, she visited Wright's private home, where this assault allegedly occurred. App., pp. 34

et seq..[1] This is the only incident of sexual assault of which Sowers complains. No incident occurred while Sowers attended school or a school sponsored activity.

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1 This deposition was originally a part of the record in the related case of *Stoneking* v. *Bradford Area School District, et al.*, 856 F.2d 594 (3d Cir. 1988), *cert. granted, vacated and remanded sur nom. Smith* v. *Stoneking* 109 S.Ct. 1333 (1989); *reaffirmed on remand* 882 F.2d 720 (1989). It was also submitted to and considered by the District Court in this case, which referred to the deposition in its recitation of facts. District Court Opinion, App. at 44. Smith, Miller and Shuey have reproduced the relevant pages of this deposition in the interest of judicial economy since, although Sowers' own Complaint does not recite these facts, her counsel have not attempted to deny this sworn testimony in the prior cases.

VIII. ARGUMENT

A. Summary of Argument

The Court of Appeals in *Stoneking II* failed to explicitly resolve the direct question posed by this Court when it granted certiorari and remanded the case for reconsideration in light of *DeShaney*. By adopting the *Stoneking II* rationale in this case, the practical effect of the Judgment Order is to leave these school officials exposed to trial and possible liability under a theory that they had a duty to protect school students from harm, which duty they allegedly failed to discharge. This *sub silentio* holding is directly contrary to *DeShaney*.

The Court of Appeals acknowledged in *Stoneking II*, however, that there was "uncertainty" in the law regarding the duty to protect. On that basis alone, Smith and Miller should have been granted immunity and dismissed from the suit.

The alternative rationale employed by the Court of Appeals in *Stoneking II*, and adopted by the panel in this case, is also insufficient. The Court extended the rationale of this Court's holding last Term in *City of Canton v. Harris*, 109 S.Ct. 1197 (1989), to create a new theory of individual capacity liability. But the Court does not explain how a failure to properly perform *official* duties results in *personal* liability. The Court's rationale conflicts with this Court's prior holding in *Rizzo v. Goode*, 423 U.S. 362 (1976).

The notion that public officials can be held *personally* liable for acts done within the scope of their official duties is both novel and dangerous, and ought to be reviewed by this Honorable Court.

B. *The Court of Appeals Failed to Resolve the Question Posed by This Court*

When this Honorable Court granted certiorari in this case initially, it vacated the judgment of the Court of Appeals and remanded the case with specific instructions to reconsider its opinion "in light of *DeShaney*". But the Court of Appeals chose to avoid this question, choosing instead to simply adopt the rationale of the panel in *Stoneking II*, which had grounded its decision on a new theory of liability.

The failure of the Court of Appeals to expressly rule on the *DeShaney* issue has the practical effect of denying Smith, Miller and Shuey's claim of qualified immunity with respect to the "duty to protect" theory of liability. In the current posture of the case, the trial court may choose to charge the jury that Smith, Miller and Shuey had a duty under the Fourteenth Amendment to protect Stoneking from the harm which allegedly befell her; the opinion of the Court of Appeals broadly hints that such a charge would be acceptable to it. Thus Smith, Miller and Shuey have for all practical purposes lost their immunity from suit with respect to this theory of liability. This is as effective as an express holding that a duty to

protect exists under the Fourteenth Amendment.

The Court of Appeals in *Stoneking II* did discuss *DeShaney*, strongly suggesting that it would have ruled that its prior ruling was "not inconsistent with the *DeShaney* opinion." Slip Opinion at p. 7, App. p. 177. But the Court refused to make an explicit holding on this basis, "because the uncertainty of the law in this respect may cause further delay."[2] The Court then announced a different theory under which it affirmed its prior ruling.[3]

Smith, Miller and Shuey respectfully suggest to this Court that the response of the Court of Appeals is not sufficient. If the law in this area is uncertain, it is the Court's job to resolve the uncertainty; the doctrine of

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2 This statement would seem to compel a ruling that Smith, Miller, and Shuey are entitled to qualified immunity, because liability cannot attach unless the law regarding a duty to protect was "clearly established" at the time of the incidents of which Stoneking complains. *See* discussion at p. 20, *infra*.

3 The Court of Appeals in *Stoneking II* went on to, in effect, decide a motion for summary judgement on the merits that Smith and Miller were never permitted to argue. That is, is there sufficient evidence in the record from which a jury could conclude that Smith and Miller actually encouraged Wright's misconduct? Smith and Miller, like Judge Stapleton in dissent, strongly believe there is not sufficient evidence to make such a finding, and would have liked the opportunity to present argument on that issue before the Court of Appeals majority issued its ruling *sua sponte*.

qualified immunity requires this.[4]

1. The Court of Appeals' opinion conflicts with Supreme Court precedent

In *DeShaney*, this Court held that the State is under no obligation to protect a person from harm unless the State has so deprived that person of his or her liberty that he or she is unable to protect him or herself. The Court of Appeals on remand in *Stoneking II* claimed that its earlier discussion of "functional custody" is "[a]rguably . . . not inconsistent with the *DeShaney* opinion." Slip opinion, p. 7, App. at 177. The Court implies that Pennsylvania's mandatory school attendance law[5] constitutes a sufficient restraint on liberty to create a duty to protect under the *DeShaney* rationale.

In *DeShaney*, the Supreme Court held that

> when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.

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[4] Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question of whether the conduct of which the plaintiff complains violated clearly established law." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

[5] 24 Pa.C.S.A. §13-1317

[citation and footnote omitted] The rationale for this principle is simple enough: when the State *by affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself*, and at the same time fails to provide for his basic human needs—*e.g.* food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. [citations omitted] *The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.* [citation omitted] In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—*through incarceration, institutionalization, or other similar restraint of personal liberty*—which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

109 S.Ct. at 1005-06 [emphasis supplied].

This language makes it absolutely clear that, in this

case, neither the school district nor its administrators violated any substantive Constitutional right of Sowers. Sowers alleges no facts from which one can reasonably find such a complete deprivation of liberty. Simply put, mandatory public school attendance does not impose affirmative restraints on liberty from which a duty of protection can arise.

It cannot be said that school attendance is a "restraint of liberty" similar to "incarceration" or "institutionalization," contexts where the Courts recognize a duty to protect. Indeed, this Court long ago recognized the significant differences between the school setting and a prison. In *Ingraham v. Wright*, 430 U.S. 651 (1977), the Court held

> [T]he public school remains an open institution. Except perhaps when very young, the child is not physically restrained from leaving school during school hours; and at the end of the school day, the child is invariably free to return home. Even while at school, the child brings with him the support of family and friends and is rarely apart from teachers and other pupils who may witness and protest any instances of mistreatment.
>
> The openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner.

Id., 430 U.S. at 670, 97 S.Ct. at 1412.

The panel in this case compounds the error of the *Stoneking II* panel because Judy Grove (now Sowers) was not even in attendance at school at the time of the only alleged assault against her. In her own Complaint she claims that she was attacked in Wright's home during summer vacation. She was not compelled by any state law or directive of the school officials to go to his home that afternoon. Without any doubt whatsoever, she was a person "at liberty" to whom, under this Court's holding in *DeShaney*, these school officials owed no duty of protection. The Court of Appeals' decision to the contrary conflicts directly with *DeShaney*.

2. The Court of Appeals opinion conflicts with rulings in other circuits

The opinion of the Court below in *Stoneking II* also implies openly that school children, when attending school, are analogous to children placed in foster homes who are mistreated by foster parents. Slip opinion at p.8., App. at p. 178. Since the *DeShaney* opinion expressly left open the question of whether liability would exist in that circumstance, *see* 109 S.Ct. at 1006, n. 9, the clear implication is that the Court would find that a duty to protect those foster children exists, and by analogy a duty to protect school children exists. This position, however, has already been rejected by two different Circuits. *See Milburn v. Anne Arundel County Department of Social Services*, 871 F.2d 474 (4th Cir. 1989), *cert. denied* 1989 U.S. LEXIS

4189 (1989) and *Doe v. Bobbitt*, 881 F.2d 510 (7th Cir. 1989).

3. *The Court of Appeals opinion conflicts with other rulings of that Court*

The *sub silentio* holding by the Court of Appeals in *Stoneking II* that school officials have a duty under the substantive component of the due process clause to protect school children is also in conflict with the holding of another panel of that Court. In *Philadelphia Police and Fire Association for Handicapped Children, Inc., et al v. City of Philadelphia*, 874 F.2d 156 (3d Cir. 1989), a unanimous panel of the Court of Appeals held that no such substantive right exists in a closely analogous situation.

In that case, a class comprised of recipients of mental retardation services filed suit to prevent the Commonwealth of Pennsylvania and the City of Philadelphia from reducing the level of services available to them, claiming a violation of equal protection and a substantive due process right to services. The Court analyzed the substantive due process claim in light of *DeShaney*, and concluded that no such rights exist. The Court noted that

> the class contends that because Pennsylvania's statutory scheme requires the mentally retarded to enter the system through the BSU's, where a plan for their care, including a placement determination, is made, the state has custody over those mentally retarded assigned to live at home. Their reli-

> ance on state-provided services, they claim, makes them absolutely dependent upon the state. Similarly, it is asserted that cessation of services will end in literal incarceration. [footnote omitted] *DeShaney*, however, forecloses the class' constructive custody argument because it makes clear that a "state's affirmative act of restraining the individual's freedom to act on his own behalf–through incarceration, institutionalization, or other similar restraint on personal liberty" is a prerequisite to the state's obligation to provide care. *DeShaney*, 57 U.S.L.W. at 4221. . . . Under [*DeShaney*] it is impossible to find an affirmative state duty to protect the mentally retarded living at home.

The Court went on to note that the fact that the class members "participated in state-sponsored day programs" was not sufficient to satisfy *DeShaney's* custody requirement. The Court held that "[i]n light of *DeShaney*, we do not believe that such intermittent custody gives rise to an affirmative duty on the state's part."

The parallels to the case at bar are obvious. In the *Philadelphia Police and Fire Association* case, the state mandated the delivery of services through the base service unit; this is analogous to the mandatory school requirement law relied upon by the *Stoneking II* Court. In the *Philadelphia Police and Fire Association* case attendance at

state-sponsored "day programs," presumably required by the BSU, was seen as only "intermittent custody" which did not give rise to a duty to protect; but the Court of Appeals in *Stoneking II* would apparently find that just such intermittent contact would give rise to such a duty. The Court's opinion in *Stoneking II* is in clear conflict with the unanimous opinion of the panel in *Philadelphia Police and Fire Association*.

C. *Smith, Miller and Shuey Are Entitled to Qualified Immunity*

This appeal, of course, arises in the context of the doctrine of qualified immunity.

The application of qualified immunity is an objective test under *Anderson v. Creighton*, 483 U.S. 635 (1987) and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). As Judge Stapleton correctly phrased the inquiry in his dissenting opinion below, would reasonable school officials with the knowledge allegedly possessed by Smith and Miller have realized in 1980 to 1983 that they were violating a well-established duty owed to Stoneking under federal law?

To begin with, the Court of Appeals' own observation in *Stoneking II* of "the uncertainty of the law in this respect", slip opinion at 8, App. p. 178, proves beyond cavil that there was not, and is not even today, any "well-established duty" or "clearly established law" in this area. In the absence of a violation of clearly established law, an individual defendant is entitled to qualified immunity from

suit. *Mitchell v. Forsyth*, 472 U.S. at 526. On this basis alone, the Court should have recognized that Smith, Miller and Shuey are immune from Sowers' claims, and dismissed the case as to the individual defendants.

But the Court of Appeals in *Stoneking II* did not end its inquiry there. Instead, it went on to hold that there was another "clearly established" duty that Smith and Miller may have violated; that is, a duty not to encourage sexual abuse of students by teachers.

To pose the proper question in terms of qualified immunity, should Smith, Miller and Shuey have realized in 1979 that anything they had done was tantamount to encouragement for Wright to assault female students, and thus violated clearly-established law prohibiting them from giving such encouragement?[6]

It is conceded that Smith and Miller, as reasonable school officials, should have known in that time period that they had a duty not to affirmatively and actively encourage sexual abuse of students. But could they have known that their conduct gave Wright any encouragement? In *Stoneking II*, the only actions of theirs that could possibly have been construed by Wright as encouragement was their handling of the Judy Grove allegations in 1979. But Judy Grove Sowers cannot claim that events subsequent to the

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[6] Smith, Miller and Shuey agree with Judge Stapleton's resolution of that question; the existing record in *Stoneking II* is inadequate "to permit a fact finder to conclude that Wright understood the administration to favor his misdeeds."

alleged assault on her gave Wright encouragement to commit the assault. There is therefore no evidence of any sort that anything Smith, Miller or Shuey did could have given Wright any encouragement to commit the alleged assault on Judy Grove.[7]

Smith, Miller and Shuey are entitled to qualified immunity and to be dismissed from the case entirely; this Court should grant certiorari and dismiss those administrators.

D. The Court of Appeals Has Improperly Applied the Principles of Municipal Liability Under City of Canton *to Individual Defendants*

In its Opinion in *Stoneking II*, the Court of Appeals relied on this Court's decision last term in *City of Canton v. Harris*, 109 S.Ct. 1197 (1989), in which this Court established that, before a municipal body can be held liable for damages under § 1983 on a theory that municipal officers were inadequately trained, the Plaintiff must show that such a failure to train amounts to deliberate indifference to the rights of persons with whom the police come in contact.

At page 10 of its slip opinion, App. at p. 180, the

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7 The Richard DeMarte incidents, discussed in the *Stoneking II* panel opinion at pp. 16-18, App. at pp. 186-188, have no bearing whatsoever on this case, since there is absolutely no evidence or allegation in this voluminous record that Wright was aware of them; thus he could not have drawn any encouragement from those alleged incidents.

Court of Appeals in *Stoneking II* argues that the *City of Canton* case provides an independent basis for liability of appellants Smith and Miller. The Court held that the defendants, "with deliberate indifference to the consequences, established and maintained a policy, practice or custom which directly caused [Stoneking] constitutional harm."[8] It then discussed evidence of how defendants Smith and Miller handled various situations they were faced with. Finally, in its Order disposing of that appeal, the Court dismissed the school superintendent, Frederick Shuey, in his individual capacity only,[9] leaving the principal Frederick Smith and the assistant principal Richard Miller as defendants in their individual capacities.[10]

It appears from the Court's opinion in *Stoneking II*

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8 Smith and Miller respectfully submit that, even on the "evidence" cited by the Court of Appeals in *Stoneking II*, it is impossible to find that they "directly caused" any constitutional harm. The band director Edward Wright caused the direct harm to Stoneking; the most the Court of Appeals could say about Smith and Miller's conduct was that they somehow condoned Wright's behavior by discouraging student complaints. *See* discussion at page 25, *supra*. This is hardly the kind of "direct" cause of harm required by *Rizzo*, *infra*.

9 The Court found no "affirmative acts by Shuey on which Stoneking can base a claim of toleration, condonation or encouragement of sexual harassment by teachers which occurred in one of the various schools within his district", and therefore no basis for liability in his individual capacity. Slip Opinion at p. 24, App. at p. 194.

10 Curiously, the panel in this case did not reverse the district court with respect to Shuey, as the *Stoneking II* panel had done. Thus, Shuey faces the anomoly that, in this case where there is even less of a basis for liability, he remains exposed to liability in his individual capacity as well.

that the conduct of those two school administrators, in the performance of their official duties for the school district, exposes them to personal liability in their individual capacities. Yet the Court give no explanation of any sort as to the source of this *personal* liability.

Since *City of Canton* deals exclusively with municipal liability, its application to a case involving (at this stage) only municipal officials is tenuous at best; at worst, it is an erosion of the principle enunciated in *DeShaney*.

In the *City of Canton* case, Plaintiffs alleged that the City of Canton failed to adequately train its police officers to determine when persons taken into their custody should receive medical attention. The Court held that the City might be liable if the Plaintiff could establish that

> in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.

Id., 109 S.Ct. at 1205.

While it might be appropriate to impose liability on the policy-making body itself (the City), the application of this principle to the municipal officers who implement the policies is far from clear. It may be that those officers who

can be said to create such policies of indifference might be found liable themselves *in their capacities as policymakers* (*i.e.* in their official capacities). But there is no justification for holding those persons liable in their individual or personal capacities.

In order to determine the capacity in which a person may be found liable, it is necessary to examine the capacity in which he acts when he does the things which allegedly result in liability. If a public official in the performance of his official duties acts in such a way as to directly violate the Constitutional rights of some person, it may be that the public official can be held liable in his official capacity. If the duty to act arises be virtue of one's official responsibilities, official capacity liability may result.

Thus, school administrators may have a duty in their official capacities not to encourage teachers to sexually abuse students. A breach of that duty may result in official capacity liability. But the Court of Appeals in *Stoneking II* held that Smith and Miller might be found liabile in their *individual* capacities if a jury believes they breached that official duty. Yet the Court does not suggest what the source of their duty in their individual or personal capacities might be. Is the Court of Appeals saying that, above and beyond their official duties as school administrators, these men owed some personal duty to Stoneking? Is that simply the "duty to protect" wearing a new disguise?

The most the Court of Appeals could say about the

allegations in *Stoneking II* is that "a jury could reasonably conclude that . . . discouragement of complaints [by Smith and Miller] amounted to a communication of condonation of the teacher's behavior," Slip Opinion at p. ???, App. ???. While the Court believes that such a jury finding would satisfy the "affirmative link" requirement of *Rizzo v. Goode*, 423 U.S. 362 (1976), a closer look at *Rizzo* reveals just the opposite.

In *Rizzo*, a group of citizens filed a class action against the City of Philadelphia police force, seeking injunctive relief under § 1983. The District Court found that none of the respondents in that case had actually participated in the deprivation of the rights of citizens, but found a "pattern" of discouraging citizen complaints and a tendency to "minimize the consequences of police misconduct." *Id.*, 423 U.S. at 368-69. Based upon those findings, the District Court required the City to prepare a set of guidelines to improve the handling of citizen complaints, and entered those new guidelines as an Order of Court. The United States Court of Appeals for the Third Circuit affirmed.

This Court reversed that judgment on several bases, including the lack of a justiciable case or controversy and out of principles of federalism. The Court discussed the merits of the § 1983 claim, however:

> Respondents posit a constitutional "duty" on the part of petitioners (and a corresponding "right" of the citizens of Philadel-

> phia) to "eliminate" future police misconduct; a "default" of that affirmative duty being shown by the statistical pattern, the District Court is empowered to act in petitioners' stead and take whatever preventive measures are necessary, within its discretion, to secure the "right" at issue. Such reasoning, however, blurs accepted usages and meanings in the English language in a way which would be quite inconsistent with the words Congress chose in § 1983. We have never subscribed to these amorphous propositions, and we decline to do so now.

Id., 423 U.S. at 376.

This case is no different than *Rizzo*. To paraphrase this Court, Sowers posits a Constitutional "duty" on the part of Smith, Miller and Shuey (and a corresponding right in herself) to "eliminate" sexual abuse of students by teachers; a "default" of that affirmative duty under her formulation should result in an award of damages under § 1983. Her "evidence" in support of a default of that alleged duty is nothing more than a claim that student complaints (like the citizen complaints in *Rizzo*) were discouraged and minimized. She does not allege that Smith, Miller or Shuey committed any act which directly deprived her of rights (just like the respondents in *Rizzo*).

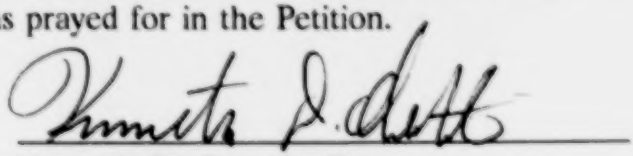
If the facts in *Rizzo* were insufficient to warrant injunctive relief under § 1983, the nearly identical facts of

this case should not be sufficient to warrant an award of damages under § 1983.

The alternative rationale adopted by the Court of Appeals is not sufficient to support a finding of personal liability against Smith, Miller and Shuey in their individual capacities; they all should have been dismissed. This Court should grant certiorari and declare that *City of Canton* cannot be extended to create liability for municipal officers in their individual capacities.

IX. CONCLUSION

WHEREFORE, Petitioners pray that a Writ of Certiorari issue from this Honorable Court to review the judgment of the United States Court of Appeals for the Third Circuit in this action. In the event that the Petition is granted, Petitioners pray that the judgment of the Court below be reversed, that the cause be remanded, and that the Court below be directed to dismiss Petitioners as defendants, as prayed for in the Petition.



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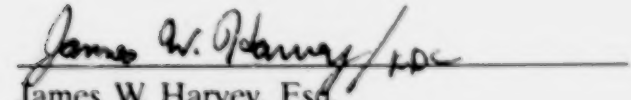

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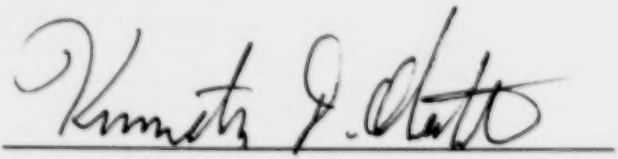
X. CERTIFICATION OF MEMBERSHIP

It is hereby certified that both of the Attorneys for the Petitioners are members of the Bar of the Supreme Court of the United States.



Kenneth D. Chestek, Esq.

XI. PROOF OF SERVICE

I hereby certify that three copies of the within Petition for Writ of Certiorari were served on Wallace J. Knox and Sean J. McLaughlin, Esq., 120 West 10th Street, Erie, PA 16501, this 13 day of November, 1989.

Kenneth D. Chestek, Esq.